

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 36248/2019

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
<p>.....</p> <p>SIGNATURE DATE</p>	

In the matter between:

In the matter between:

ORGANISATION UNDOING TAX ABUSE NPC

Applicant

and

**SERVICES SECTOR EDUCATION
TRAINING AUTHORITY**

First Respondent

GRAYSON REED CONSULTING (Pty) Ltd

Second Respondent

JUDGMENT

Delivered: *By transmission to the parties via email and uploading onto Case Lines the Judgment is deemed to be delivered. The date for hand-down is deemed to be 04 November 2021*

SENYATSI J:

- [1] This is an application in terms of which the applicant (“OUTA”) seeks, *inter alia*, an order setting aside the decision of the deputy Information Officer of the first respondent (“SETA”) dated 22 March 2019, when she refused access to items 5 to 18 of the OUTA’s request for access to information dated 22 January 2019 which records should be provided within 15 days from the date of the order.

- [2] Organisation Undoing Tax Abuse (“OUTA”) is a non-profit company, duly incorporated in terms of the laws of the Republic of South Africa with its registered address at 318 Oak Avenue, O’Keeffe and Swartz Building, Randburg, Gauteng. OUTA’s main aim is to hold the government accountable and to ensure the responsible use of tax revenue throughout all levels of government, including public bodies such as SETA.

- [3] The Services Sector Education and Training Authority (“SETA”), is a public body duly established in terms of section 9 of the Skill Development Act 97 of 1998 with its Head Office at Sherborne Road, Parktown, Johannesburg.

- [4] Grayson Reed Pty Ltd (“Grayston Reed”) is a private company duly incorporated in terms of the company laws of South Africa with its registered office situated at 93 Grayston drive, Sandton, Johannesburg.

- [5] OUTA avers that it obtained information through a number of whistle-blowers indicating tender irregularities within SETA, such irregularities which could amount to fraud, corruption or maladministration. More specifically, OUTA was informed of a tender at SETA under bid reference PROC T434 that was awarded to Grayston Reed which was suspected to be fraudulent, corrupt or awarded through maladministration.
- [6] The tender was for the provision of student attendance monitoring systems and the disbursement of learner stipends for a total value of R 162 million.
- [7] Grayston Reed has been cited as it has interest in the litigation but is not involved in terms of resisting the application, a sit has not provided any evidence in this application.
- [8] In order to evaluate and assess the information received through the whistle-blowers, OUTA made a formal request to SETA during January 2019 as set out in "FA1" attached to the Founding Affidavit and sought information as set out below:
- 8.1. Copy of the SETA's latest copy of supply chain management policy;
 - 8.2. Copy of the Needs Analysis Assessment conducted by the first applicant in respect of Tender PROC T 434;
 - 8.3. Copy of the tender advertisement in respect of the tender;
 - 8.4. Copy of the Tender Compliance Checklist in respect of the said tender;
 - 8.5. Copy of documents submitted by Grayston Reed in response to

SETA's request for the bid in respect of the published tender; and the information was to include, but not limited to:

- (a) Invitation to bid;
- (b) tax clearance requirements;
- (c) pricing schedule;
- (d) Declaration of interests;
- (e) contract form;
- (f) declaration of bidders past SCM practices;
- (g) certificate of independent bid determination;
- (h) authority of signatory;
- (i) terms of reference specifications;
- (j) general conditions of contract;
- (k) supplier declaration form;
- (l) bid document checklist.

8.6. Grayston Reed's Companies and Intellectual Property Commission ("CIPC") certificate submitted by Grayston Reed in respect of the tender.

8.7. Copies of the following documents, submitted by Grayston Reed including:

- (a) original cancelled cheque or letter from the bank verifying bank details;
- (b) certified copy of the identity document of the shareholder or directors or members;
- (c) certified copy of certificate of incorporation CM 29/CM 9 (name changes);
- (d) certified copy of the certificate of shareholder;
- (e) a letter with the company letter head confirming physical and postal addresses;
- (f) original or certified copy of SARS tax clearance certificates

and VAT;

- (g) proof of company registration with National Treasury Central Supplier database ("CSD");
- (h) proof that Grayston Reed was compliant on the CSD prior to the award of the tender;
- (i) Proof of B-BEE status of contractor

- 8.8. Copy of the recommendation of the Bid Specification Committee to appoint Grayston Reed as the service provider in respect of the above-mentioned tender.
- 8.9. Copy of the recommendations of the Bid Evaluation Committee to appoint the Grayston Reed as a service provider in respect of the above-mentioned tender;
- 8.10. Copy of the recommendation of the Bid Adjudication Committee to appoint Grayston Reed as the service provider in respect of the above-mentioned tender;
- 8.11. Copy of the minutes of the Board meeting in which the Accounting Authority approved the appointment of Grayston Reed as the service provider in respect of the above-mentioned tender;
- 8.12. Copy of the letter of award sent to Grayston Reed in respect of the above-mentioned tender;
- 8.13. Copy of the Master Service Level Agreement between Grayston Reed and the SETA signed on 13 December 2017;
- 8.14. Copies of the billing documentation for the period 1 November 2017 to 31 January 2019 in terms of the Master Service Level Agreement mentioned in 8.12, including the:
 - (a) Order/ requisition forms;
 - (b) Quotes;

- (c) invoices;
- (d) proof of payment/ remittance;
- (e) proof of delivery notes;
- (f) Deliverance reports;
- (g) payment advice forms;

8.15. Copy of the database or register of learners and entities who received stipends in terms of the Master Service Level Agreement mentioned in paragraph 8.12 above

8.16. Copy of the scheduled payments made by SETA to the second respondent during the period 1 November 2017 to 31 January 2019.

8.17. Copies of the biometric attendance reports generated by the biometric units supplied by the Grayston Reed in terms of the Master Service Level Agreement mentioned in 8.12 during the period 1 November 2017 to 31 January 2019;

8.18. The names and CIPC registration numbers, if any, of any companies which were sub-contracted to provide services in respect of the above-mentioned tender;

[9] The information was sought in terms of the Promotion of Access to Information Act 2 of 2000 ("PAIA"). OUTA contends that the required information cannot be construed as confidential due to the large volumes they have requested. SETA extended the period within which a response to the request for information by 30 days in accordance with section 26 of PAIA.

[10] In its response, SETA granted access to limit information, mainly two items 8.1 to 8.4 as set out above which is:

- 10.1 the first applicants latest supply chain management policy;
- 10.2. a copy of needs analysis assessment that it conducted in respect of the tender;
- 10.3. a copy of the tender advertisement that was published on 21 August 2017, and;
- 10.4. a copy of the tender compliance checklist in respect of the tender.

[11] SETA refused the request for access to all other records sought for various reasons. In regards to access to the copy of the recommendations of the Bid Specification Committee, listed as item 8.8 above, it contended that this record did not exist because there was no such committee within its structure. It also refused access to all other records sought on the basis of an objection raised by Grayston Reed, which was against the granting of access to information sought. SETA contends that the requested information contained Grayston Reed's trade secrets; confidential financial, commercial and technical information.

[12] Furthermore, SETA contends that the disclosure of the requested information will cause serious harm to the second respondent's commercial interests and to the Greyston Reed as a whole. Counsel further argued that disclosure of the requested information would contractually prejudice Grayston Reed in commercial competition.

[13] In a letter addressed to the SETA, Greyston Reed contended that the disclosure of the requested information will compromise the ongoing execution of its

obligations in terms of the contract awarded to it. Furthermore, that the disclosure may harm its relationship with its consortium, finance and technology partners.

[14] After the response was received from SETA, OUTA appealed against the decision in terms of section 74 and 75 of PAIA, based on the contention that the objection by Grayston Reed was illogical as all documents requested formed part of the public tender process. In its internal appeal OUTA furthermore contended that the matter falls under section 46 of PAIA which provides that access to information must be granted if the disclosure of the record would reveal evidence of a substantial contravention of, or a failure to comply with the law and the public interest in the disclosure of the record outweighs the harm contemplated as the ground for refusal.

[15] On 29 May 2019 OUTA was advised by SETA that a decision on the internal appeal would be made by the relevant authority on or before 28 June 2019 after a special sitting to consider the appeal. No decision was made on the said date. However, upon the launching of the current application and service thereof to SETA the outcome of the internal appeal was communicated to the applicant on 17 October 2019 in terms of which the appeal was dismissed. It is worth noting that in its answering affidavit SETA states that it does not wish to be obstructive and that it would abide by the decision of this court, but in the same breath contends that the decision it took was correct. This is a contradiction as the application is for all intent and purposes, opposed.

- [16] The issue to be determined in this matter is whether the information requested falls to be protected as contemplated in sections 36 and 37 of PAIA, as contended by Grayston Reed in its letter addressed to SETA. Put differently, the main issue is whether any facts or evidence have been adduced or papers filed to persuade this court that the refused excess deserves protection under sections 34, 36 and 37 of PAIA.

LEGAL PRINCIPLES AND REASONS

- [17] Section 32 of the Constitution of South Africa provides as follows:

“Access to Information

(1) everyone has the right of access to: -

(a) Any information held by the State; and

(b) any information that is held by another person and that is required for the exercise or protection of any rights

(2) National legislation must be enacted to give effect to this right and may provide for reasonable measures to alleviate the administrative and financial burden on the state.”

The provisions of this section were given effect, *inter alia*, by the promulgation of PAIA. SETA is a national public entity as listed under part A to schedule 3 of the Public Finance Management act 1 of 1999 and as a result of this classification, is required to give information as required by Section 32(1) of the Constitution and PAIA.

[18] Section 11(1) of PAIA provides the right of access to records of public bodies. It provides as follows:

“(1) Requester must be given access to a record of a public body if: -

(a) that request that complies with all procedural requirements in this Act relating to a request for access to that record, and

(b) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part

(3) A requester right to access contemplated in subsection (1) is, subject to this Act, not affected by-

(a) any reasons the requester gives for requesting access, or

(b) the information officers' belief as to what the request is reasons are for requesting access.”

It is without doubt, that the section imposes a duty on a public body to give access to information when so requested. This approach is further supported by section 32 of the Constitution which ensures the right not to be refused access to information.

[19] Our courts have considered the importance of the right of access to information and in *President of the Republic of South Africa v Mail & Guardian Ltd*,¹ the Constitutional Court restated the importance of the right as follows:

¹ 2012 (2) SA 50 (CC) at para [9]

“[9] As is evident from its long title, PAIA was enacted to give effect to the constitutional right of access to any information held by the state. and the formulation of section 11 casts the exercise of this right in peremptory terms- The requester ‘must’ be given access to the report so long as the requestor complies with the procedures outlined in the Act and the record requested is not protected from disclosure by one of the exemptions set forth therein under our law, therefore the disclosure of information is the rule and exemption from disclosure is the exception.”

[20] In *Brumer v Minister for Social Development and Others*² in giving effect to the importance of the right of access to information, the Constitutional Court had the following to say:

“[62] As I have held above, section 78(2) has a dual limitation; it limits not only the right to seek judicial redress, but in effect also the right of access to information by imposing a very short time within which a person seeking information must launch litigation. the importance of this right too, in a country which is founded on values of accountability, responsiveness and openness cannot be gainsaid. to give effect to these founding values, the public must have access to information held by the state. Indeed, one of the basic values and principles governing public administration is transparency. and the constitution demands that transparency must be fostered by providing the public with timely, accessible and accurate information.”³

² 2009(6) SA 323 (CC)

³ See section 195 (1)(a) of the Constitution

- [21] It is clear that the statutory provisions of PAIA and by extension the Constitution do not require the requester to provide reasons before access is granted. Therefore, access to information cannot be affected by the information officer's belief regarding of what OUTA's reasons are for requesting access to such information.
- [22] Section 81(3) of PAIA provides that the burden of establishing that the refusal of a request for access complies with the provisions of PAIA rests with the party claiming that it does. Accordingly, SETA had to demonstrate that the refusal of OUTA's request was justifiable under the provisions of section 36, 37 and 44 of PAIA.
- [23] Section 36, 37 and 44 of PAIA provide a number of justification grounds for refusal of requests for access to information. A party relying on the provisions of the sections above must produce evidence to support, by any materials in his possession, the basis for refusing to give access to information.
- [24] SETA has, in my view, failed to produce any evidence in support of the refusal to grant access to the information and without testing the contents of the letter, the information officer believed what was told to her by Grayston Reed that the information requested was confidential and that it would harm the commercial interests of the second respondent. This argument is not good enough to shield SETA from its inability to act in accordance with the provisions of PAIA. SETA was expected to act independently and apply itself properly to the request made without influence from Grayston Reed, and this it did not do.

[25] As previously stated, Grayston Reed did not oppose this application and based on the papers before me, I have found no justifiable grounds or protection afforded to SETA by Section 36, 37 and 44 of PAIA. I come to this conclusion because any third party, who engages in business with any public body, does so with the full knowledge that once information is handed over to a public body, that information opens itself to public scrutiny and these are the fundamental values that are protected by our Constitution in terms of which transparency forms part of the core values of our democratic order.

[26] In addition to this, no evidence has been adduced before this court in support of the refusal to grant access to the information. In her answering affidavit the SETA's Chief Executive Officer simply states that she has the belief that the refusal to grant access to information was correct and therefore justified. No basis is laid out for such belief, which goes against the provisions of section 11 of PAIA. And of course the right protected by section 32 of the Constitution to access to information.

[27] The conduct by the a public body to refuse to grant access to information in a similar manner was previously frowned upon in *De Lange v Eskom Holdings Ltd and Others*⁴ the court said the following:

“[127] In terms of section 25(3)(a) of PAIA, Eskom was enjoined or expected to provide adequate reasons for refusal. it is my considered view that Eskom did

⁴ 2012 SA 280 (GSI)

not comply with the requirements of the above section. From Eskom's answering affidavit it appears also that Eskom only gave due regard to representations from Billiton not to grant the applicant's request for access to the information. That also falls foul of section 49(1)(a) of PAIA. Eskom in my view has been nudged from behind by Billiton to refuse to disclose and they are helplessly trudging forward, or being stringed along."

In my considered view, the *De Lange v Eskom* case has similarities to the instant case. SETA only refused to grant access to information based on the objection by Grayston Reed and to use the words of Kgomo J, SETA in the present case was nudged from behind by Grayson Reed to refuse access. I have already found that there is no factual or legal basis for such refusal to grant access to the information as requested by OUTA.

[28] I now need to deal with the public interest issues raised from OUTA's papers, it contends that the information is required in terms of section 46 of PAIA. Section 46 has been promulgated to serve as a mandatory public interest override provision where one or more grounds of refusal have been established. The sections requirements are mandatory; where access to records is denied under section 36 (1)(b) or (c) or section 37 (1)(a), an information officer must nonetheless grant access to the record if it is in the public interest to do so.⁵

[29] In the heads of arguments submitted on behalf of SETA, counsel conceded that the only basis for refusal to grant access to information, is the objection raised by the Grayston Reed through a letter or written representations. Those

⁵ De Lange v Eskom Holdings Ltd and Others above at para [133]

representations have already been found to be inadequate to justify refusal by SETA to grant access information.

[30] Counsel for OUTA also mentioned that the decision not to disclose the requested information was primarily motivated by the reasons for OUTA's request. This falls foul of section 11 which clearly states that it matters not what the reasons for the required information are. In other words, the motive for the request can never and should never be used as a ground to deny or refuse access to the requested information.

[31] There is also a submission made on behalf of SETA that the applicant is incorrect in suspecting that there were irregularities in the awarding of the tender. This is an irrelevant and illogical submission. Our Constitutional values require that public bodies be transparent, and that transparency in turn equates to public confidence on how the public funds are managed. It follows therefore that the submission has no factual basis and is rejected.

[32] It should be remembered that the outcome of the internal appeal was communicated by SETA to OUTA during October 2019 after this litigation had commenced. It should also be kept in mind that the tender award expired or lapsed during March 2020. Consequently, all information relating to the record of the tender was historical. It follows in my view, that nobody and especially OUTA would have derived any commercial advantage over Grayston Reed, because the tender had been executed. This therefore makes the refusal to grant access to information or record of the tender illogical.

[33] It is no excuse, as SETA is attempting to do, to shield behind the so-called competing interest of Greyston Reed and those of OUTA. There is no conflict, OUTA is not a competitor of Grayston Reed but an NGO with a specific mandate to hold government and its public bodies accountable on its use of funds from the public purse. It is impermissible to act as Greyston Reed's proxy by refusing access based on the objection by Grayston Reed. SETA is a public body and should not act at the instruction of Grayston Reed. SETA is enjoined by section 11 of PAIA to give access to information provided by statutory requirements are met by OUTA. SETA does not raise a defence of non-compliance with the formal requirements of PAIA.

[34] OUTA has in my considered view made out a case and is entitled to the relief sought.

ORDER

[35] The following order is made:

- (a) the decision of the deputy Information Officer of SETA dated 22 March 2019 in which he refused access to items 5 to 18 of OUTA request for access to information dated 22 January 2019, is hereby set aside;
- (b) the SETA is directed to furnish OUTA with a copy of all records set out in its request for access to information dated 22 January 2019 within 15 days of the date of this court order;

(c) SETA is directed to pay the costs of this application.

A handwritten signature in black ink, consisting of a large, stylized 'S' followed by a series of loops and a long horizontal stroke.

SENYATSI ML

***Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg***

REPRESENTATION

Date of hearing: 08 June 2021

Date of Judgment: 04 November 2021

Applicants Counsel: Adv. O Ben-zeev

Instructed by: Jennings Incorporated

First Respondent's Counsel: Adv. D Gomba

Instructed by: Ndumiso Voyi Incorporated